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HELENA MUNICIPAL
COURT

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BY: 
CLERK

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Region 4 OPD

7 IN THE HELENA MUNICIPAL COURT, CITY OF HELENA
8 BEFORE ROBERT WOOD, MUNICIPAL COURT JUDGE

9 THE CITY OF HELENA,

10 Plaintiff,

11 -vs-

12 MARK ALLEN LEE,

13 Defendant.
14
15

Cause No. 2013-NT-5172

**MOTION TO RESCIND
APPOINTMENT IN PENDING
CASE AND IN ADDITIONAL
CASES**

16 COMES NOW William F. Hooks, Chief Public Defender for the Office of the State
17 Public Defender (OPD), and moves the Court to revoke or rescind its order or notice appointing
18 the state public defender to represent the defendant in this case, and to assign the case to new
19 counsel, and to halt assignment of cases to the Office of the Public Defender for a period of
20 time to be determined by the Court, pursuant to the Fifth, Sixth and Fourteenth Amendments to
21 the United States Constitution, Article II, Sections 15, 17, 24 and 25, the provisions of Titles 46
22 and 47 of the Montana Code Annotated, and the Montana Rules of Professional Conduct. In
23 support, undersigned counsel represents the following:
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INTRODUCTION

In 2005, the Montana Legislature enacted the Montana Public Defender Act (the Act). *See*, § 1, Ch. 449, L. 2005; codified at § 47-1-101, et seq., MCA. The Act created a state-wide public defender system to deliver public defender services in all courts in the State. The Act also created a Public Defender Commission (PDC or Commission) and an Office of the State Public Defender (OPD). The Commission supervises and directs the public defender system, and the Chief Public Defender administers the system. Sections 47-1-104(1), 47-1-105, and 47-1-201, MCA.

ASSIGNMENT OF COUNSEL

When a court orders the office to assign counsel, the appropriate office shall immediately assign a public defender qualified to provide the required services. Sections 47-1-104(3), 47-1-111(1), and 46-8-101, MCA.

A court may order the assignment of counsel, pursuant to § 47-1-104(4)(a), MCA, in enumerated criminal and civil cases in which a person is entitled to assistance of counsel at public expense because of financial inability to retain private counsel, subject to a determination of indigence pursuant to § 47-1-111, MCA. These cases include, but are not limited to the following:

- a person charged with a felony or a misdemeanor for which there is a possibility of incarceration;
- a parent, guardian or custodian of a child in a removal, placement or parental-rights termination case and as required under the Indian Child Welfare Act; and
- persons involved in proceedings for involuntary commitment due to a mental disorder.

Section 47-1-104(4), MCA.

1 Pursuant to policies approved by the Commission pursuant to § 47-1-104(3), MCA,
2 OPD requires clients to fill out an application and provide financial information. If the client
3 fails to do so in a timely manner, OPD policy requires that OPD file a motion to rescind the
4 appointment.
5

6 Pursuant to § 47-1-111(3), MCA, a person is indigent if (1) his or her gross household
7 income is no more than 133% of the current federal poverty guidelines; or, (2) the disposable
8 income and assets of the applicant and members of the applicant's household are insufficient to
9 retain competent private counsel without substantial hardship to the applicant or members of
10 the applicant's household.
11

12 If the person for whom counsel has been assigned is later determined to be ineligible for
13 public defender services, OPD must notify the court so the court's order may be rescinded.
14 However, a person for whom counsel is assigned is entitled to "the full benefit of public
15 defender services" until the court's order requiring the assignment is rescinded. Sections 47-1-
16 111(1) (b), (c), MCA; 46-8-101(2), MCA.

17 The court may order OPD to assign counsel at public expense regardless of the person's
18 ability to retain private counsel in enumerated cases, including, but not limited to:
19

20 any child or youth involved in a proceeding under a petition filed pursuant to 41-
21 3-422 when a guardian ad litem is appointed for the child or youth;
22 a youth in proceedings in youth court;
23 a persons involved in proceedings for involuntary commitment due to a
24 developmental disability; and
25 a person who is the subject of a petition for the appointment of a guardian or
conservator under Title 72 of the laws of Montana.

Section 47-1-104(4)(b), MCA.

1 Once counsel is assigned, that assignment is effective until final judgment. Section 46-
2 8-103, MCA.

3 State and federal constitutional provisions also guarantee the right to effective
4 assistance of counsel.

6 STATEWIDE STANDARDS FOR PUBLIC DEFENDERS

7 The Commission, as directed by the Act, established statewide standards for the
8 qualification and training of attorneys providing public defender services to ensure that services
9 are provided by competent counsel and in a manner that is fair and consistent throughout the
10 state. Section 47-1-105, MCA. *See, Standards for Counsel Representing Individuals Pursuant*
11 *to the Montana Public Defender Act* (hereafter, Standards). Relevant Commission Standards
12 are attached as Exhibit A.

15 Practice Standards

16 The Commission's standards took into consideration a number of factors, including
17 practice standards and performance criteria. Section 47-1-105(2) (b), MCA.

18 The Commission has promulgated standards for counsel in criminal cases, from the
19 initial assignment to the direct appeal. The Commission has adopted separate representation
20 standards for representation in youth court proceedings, proceedings for involuntary
21 commitment due to mental illness, proceedings for involuntary commitment due to
22 developmental disability, representation of parents in dependent/neglect cases, and
23 representation in guardianship or conservatorship proceedings.
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1 The Commission determined that “[b]efore agreeing to act as counsel, counsel has an
2 obligation to make sure that counsel has available sufficient time, resources, knowledge, and
3 experience to offer effective representation to a defendant in a particular matter. If it later
4 appears that counsel is unable to offer effective representation in the case, counsel should move
5 to withdraw.” Standard VI.D.1.A. (*See* Exhibit A.)
6

7 **Attorney Workload Levels**

8 As mandated by § 47-1-105(2), MCA, the Commission’s statewide standards for public
9 defender services took into consideration “acceptable caseloads and workload monitoring
10 protocols to ensure that public defender workloads are manageable[.]” Section 47-1-105(2)(b),
11 MCA.
12

13 The Commission determined that “[c]aseload levels are the single biggest predictor of
14 the quality of public defense representation. Not even the most able and industrious lawyers
15 can provide effective representation when their work loads are unmanageable.” Standard
16 V.1.A. (*See* Exhibit A.)
17

18 The Commission has not set numerical maximum caseload standards. “Each case is so
19 individually different, that it is nearly impossible to set rigid numerical objectives. Also,
20 physical and geographical factors can influence an office's caseload capacity as well.” Standard
21 V.2.A. (*See* Exhibit A.)
22

23 It is the Commission’s intent that “in considering caseloads, that the caseload of each
24 counsel shall be considered by the criteria of reasonableness.” Standard V.2.B. (*See* Exhibit
25 A.)

1
2 **Work Load Monitoring**

3 It is OPD's mission to ensure that "no attorney doing public defender work, either as an
4 employee or as a contract attorney, has a workload of such an amount that clients are not being
5 adequately represented and/or the wellbeing of the attorney is jeopardized." OPD Policy 117, ¶
6 1.1. (See Exhibit B.)

7 OPD uses a case-weighting system assess whether attorney caseloads are appropriate. A
8 copy of the case-weighting protocol is attached as Exhibit C. The case-weighting system
9 requires daily tracking of case assignments in all criminal and civil cases, generation of
10 summary reports, and monitoring by supervising attorneys of each attorney's monthly case
11 rates.
12

13 Specific types of cases are to be valued and hours are to be tracked and entered daily. A
14 monthly report is generated, and the attorney is to review the report monthly.

15 Regional deputy public defenders (RDPD) and managing attorneys are responsible for
16 managing the workloads of the attorneys. When an attorney's monthly hours reach 125, the
17 regional deputy or managing attorney must meet with the attorney to discuss the attorney's
18 caseload. Policy 117 sets out a detailed procedure by which cases are assigned. The
19 assignment policy requires consideration of caseloads and ongoing supervisor monitoring of
20 staff attorney caseloads.
21

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1 **Excessive Workload Obligations**

2 As mandated by § 47-1-105(6), MCA, the Commission established policies and
3 procedures for handling excess caseloads.

4 Staff attorneys have an obligation to report to managers or RDPDs “[w]henever, ...
5 counsel determines, in the exercise of counsel's best professional judgment, that the acceptance
6 of additional cases or continued representation in previously accepted cases, will lead to
7 furnishing representation lacking in quality or the breach of professional obligations[.]”
8 Standard V.1. A. (See Exhibit A.)
9

10 The regional deputy must inform the Chief Public Defender when caseloads become
11 excessive. Whenever the Chief Public Defender “determines, in the exercise of his or her best
12 professional judgment, that the acceptance of additional cases or continued representation in
13 previously accepted cases will, by reason of their excessive size and complexity, interfere with
14 the rendering of quality representation, or the breach of professional obligations, the Chief
15 Public Defender is required to inform the Montana Public Defender Commission[.]” Standard
16 V.1. A; B. (See Exhibit A.)
17

18 Attorneys and managers alike have ethical obligations to avoid excessive workloads
19 which may lead to representation contrary to the Rules of Professional Conduct. “If a lawyer
20 believes that her workload is such that she is unable to meet the basic ethical obligations, she
21 must not continue the representation of that client. If representation has not yet begun, the
22 lawyer must decline the representation.” American Bar Association, Standing Committee on
23 Ethics and Professional Responsibility, Formal Ethics Opinion 06-441(2006), at 4.
24
25

1 Counsel have a duty to avoid conflicts of interest. Rule 1.7 of the Montana Rules of
2 Professional Conduct provides that a lawyer shall not represent a client if the representation
3 involves a concurrent conflict of interest. A concurrent conflict of interest exists if the
4 representation of one client will be directly adverse to another client; or there is a significant
5 risk that the representation of one or more clients will be materially limited by the lawyer's
6 responsibilities to another client.

7 A conflict of interest is created when excessive caseload forces a public defender to
8 choose between the rights of the various indigent criminal defendants he or she represents.
9 Both managers in a public defender agency and subordinate attorneys are bound to follow the
10 rules of professional conduct. Rules 5.1, 5.2, MRPC.

11 OPD counsel are subject to disciplinary sanctions. According to the Office of
12 Disciplinary Counsel, 2011 Annual Report ("Annual Report"), at 13, 22% of complaints filed
13 with ODC in 2011 were against public defenders. During the same period, more docketed cases
14 were filed in the "criminal defense" area of practice than in any other type of practice.
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17 **CONTRACT ATTORNEY RESOURCE**

18 OPD contracts with private attorneys to provide public defender services within each
19 public defender region. Section 47-2-216, MCA.

20 Costs and expenses incurred by private attorneys in both non-conflict and in conflict
21 cases are charged to the budget of the region in which the case was filed.
22

23 The Commission has adopted rules to establish rates of compensation for contract
24 attorneys. Attorneys who accept cases, non-conflict or conflict, from OPD are paid \$60 per
25

1 hour, and may claim an additional \$25 per month as a stipend for expenses incurred. Sections
2 47-1-216(7), MCA; ARM 2.69.601.

3 4 **REGION FOUR**

5 The Commission, pursuant to § 47-1-104(2), MCA, divided the State into eleven
6 regions. Lewis and Clark County, Broadwater County, and Jefferson County make up OPD's
7 Region Four. Region Four provides representation in three district courts, eight courts of
8 limited jurisdiction, and one drug court in these counties.

9
10 When OPD began operations on July 1, 2006, Region Four had a regional deputy, eight
11 attorneys, five support staff, and one investigator.

12 Now, Region Four is authorized a regional deputy, ten staff attorneys, four support
13 staff, and one investigator.

14 For criminal cases filed in courts in Lewis & Clark County, OPD is appointed at the
15 initial appearance of a defendant in court following the filing of a criminal charge. If at the
16 initial appearance the accused requests that counsel be appointed, the court orders OPD to
17 assign counsel with a document entitled "Notice of Appointment of Public Defender." Twice
18 daily, OPD legal assistants pick up new Notices of Appointment at the county courthouse in
19 Helena.
20

21 Region Four maintains a separate attorney rotation list for each court in which it
22 provides representation in criminal cases. The regional deputy bases placement of attorneys on
23 each list based on the experience level of the attorney and court scheduling
24 considerations. Less experienced attorneys generally handle misdemeanors, while more
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1 experienced attorneys generally handle felonies. Region Four's office manager tentatively
2 assigns a new case to the attorney next on the rotation list for that court. The regional deputy
3 then reviews the tentative assignments, and makes changes to balance caseloads and to match
4 the case's complexity to the attorney's experience. OPD legal assistants then create an
5 electronic file in Justware, OPD's case management software, and create a physical file for the
6 assigned attorney.

7
8 Managers in Region Four usually learn that OPD has been assigned in civil cases when
9 they are notified of the assignment via email by a staff person from the Lewis and Clark
10 County Attorney's office.

11 Involuntary commitment initial hearings, at which respondents are advised of their
12 rights, are usually scheduled for the same day the petition is filed; the hearing on the merits of
13 the petition usually occurs within 24 to 72 hours of the initial hearing.

14 Because of the short timeline, most attorneys are frequently scheduled to be in court or
15 meeting with clients during one or both hearings. As a result, involuntary commitment cases
16 are assigned to any attorney who is available at the appointed hearing times.

17
18 The timeline for petitions for an involuntary commitment based on a developmental
19 disability is not as short. Those cases are assigned to attorneys based on experience and current
20 workload.

21 A parent in a dependent-neglect case is assigned to an attorney by the regional deputy
22 based upon the attorney's experience and current workload. The remaining parties in the case
23 are referred to conflict counsel.
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The procedure used to appoint attorneys in Jefferson and Broadwater Counties is similar to that which is used in Lewis and Clark County, except that courts outside Helena often fax or mail Notices of Appointment. Region Four has informal agreements with contract attorneys who accept most misdemeanor cases in Jefferson County; and most misdemeanor, felony, and civil cases in Broadwater County. The remaining clients in those counties are represented by a full-time OPD attorney whose job duties include frequent travel.

FACTUAL REPRESENTATIONS

I have monitored the workloads of Region Four attorneys in my capacity as Chief Public Defender.

In Fiscal Year 2012, 3,053 new cases were assigned to Region Four: 1,103 in the district courts and 1,950 in the other courts. Over 1,900 of those cases carried over into the first quarter of FY 2013 and some 774 new cases were assigned in that quarter. 1,300 were carried over into the second quarter, during which more than 650 new cases were assigned. The open cases carried over into the third quarter were 1,721. Region Four opened approximately 2,900 cases in FY 2013.

The case-weight numbers for Region Four attorneys significantly exceed the 125 hour-per-month “red flag” case-weighting standard, in several months by double or more the 125 hour limit. *See*, Affidavit of Jennifer Kaleczyc, attached hereto.

Region Four attorneys have been assigned between well over 400 cases in their first year of practice, since being admitted to practice and joining OPD. (*See Exhibit D, Affidavits of Brady Minow Smith and Jennifer C. Kaleczyc.*)

1 Because all Region Four attorneys have too many cases, management cannot curtail
2 new case assignments to the affected lawyers, or reassign cases within the office.

3 Turnover in Region Four has significantly hampered the ability of the office to
4 effectively represent clients. Since May 2012 the previous regional deputy, six staff attorneys,
5 three office managers, a receptionist, and one previous investigator left Region Four for new
6 positions outside the public defender system.

7 Attorneys who have contracts with OPD to provide representation to indigent clients do
8 not provide adequate relief. Those few attorneys who are willing to represent indigent persons
9 at \$60 per hour cannot absorb the staff attorneys' excess cases. There is a limited number of
10 private attorneys willing to accept cases in Region Four. Some will only accept specific types
11 of cases. For the ethical obligations identified earlier, economics, or for any reason, the contract
12 attorney has the option of rejecting an appointment offered by OPD.

13 In the 2013 legislative session, OPD asked for funds to hire 37 FTEs. The legislature
14 authorized only eight FTEs. OPD is attempting to identify any and all sources of funding by
15 which even temporary FTEs can be hired to help with the excessive workloads.

16 Due to the excessive workloads, OPD attorneys in Region Four must prioritize some
17 cases over others. They are unable to meet with clients in a timely and sufficient manner,
18 conduct legal research, adequately investigate, conduct an adequate motions practice, engage in
19 adequate plea negotiations, prepare for trial and/or sentencing, or perform a host of other
20 responsibilities on behalf of their clients. (See Exhibit D, Affidavits of Dave Burleigh, Jonathan
21 King, Brady Smith.)
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1 As a result, caseload levels for public defender lawyers have reached the point where I,
2 as Chief Public Defender, have the ethical obligation to take immediate action to address this
3 situation in order to keep OPD's public defender lawyers in compliance with their duty under
4 the Montana Rules of Professional Conduct to provide diligent and competent representation
5 and in order to safeguard indigent criminal defendants' right to have competent defense counsel
6 appointed to represent them.

7 I have discussed with the regional deputy in Region Four plans by which attorneys
8 could withdraw from certain kinds of cases, and to seek to decline appointments to represent
9 indigent defendants and civil litigants in certain kinds of cases.
10

11 REQUEST FOR RELIEF

12 For the reasons discussed above, I respectfully request:

13 That the Court hold a hearing on this request, and accept evidence and testimony;

14 That the Court issue an order rescinding its order or notice appointing the state public
15 defender to represent the defendant in this case, and assigning the case to new counsel;

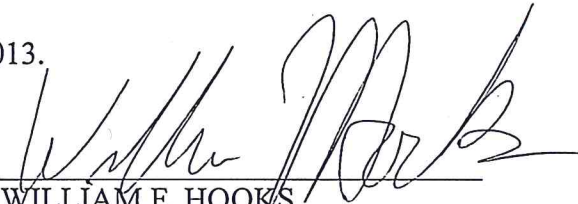
16 That the Court issue an order declaring that undersigned counsel, in his capacity as
17 Chief Public Defender for the state Office of the Public Defender, and the regional deputy
18 public defender, may, consistent with their ethical, constitutional and statutory obligations,
19 legally decline to accept appointments to represent indigent criminal defendants and indigent
20 civil litigants, for a defined period of time, at which further inquiry may be had;

21 That the Court further order that if the State or City determines to prosecute indigent
22 criminal defendants and civil parties whose cases OPD decline, such indigent persons must be
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1 appointed private counsel who must be paid with funds from the State, and, that the Court
2 further order that without appointed, state-compensated defense counsel, the prosecution of
3 indigent criminal defendants cannot go forward, and the charges against such defendants must
4 be dismissed.

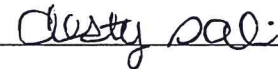
5 For such other and further relief as the Court deems just.

6
7 DATED this 5th day of September, 2013.

8 
9 WILLIAM F. HOOKS
10 Chief Public Defendant

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12 **CERTIFICATE OF SERVICE**

13 The undersigned certifies that the foregoing motion was duly served upon Helena City
14 Attorney Jeff Hindoien by delivering a copy to the City Attorney's Office at 316 N Park,
15 Helena, MT 59601 via inter-office mail on the 5th day of September, 2013.

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